Before the
ILLINOIS COMMERCE COMMISSION

In the Matter of the Petition of SCC Communications Corp. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with SBC Communications Inc.	))))))	Docket No. 00-0769

BRIEF ON EXCEPTIONS OF AMERITECH ILLINOIS

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Illinois Bell Telephone Company ("Ameritech Illinois") respectfully submits its brief in support of its exceptions to the Hearing Examiners' Proposed Arbitration Decision ("HEPAD") in the above-captioned arbitration. The principal exception to the HEPAD is not any of its specific findings or conclusions but that the HEPAD entertained SCC's petition for arbitration in the first place. As we demonstrate in Section I of this brief, the Telecommunications Act of 1996 ("1996 Act" or "Act") does not entitle SCC Communications Corporation ("SCC") to arbitration under section 252 of the Act, nor to an agreement with Ameritech Illinois that conforms with the substantive requirements in section 251 of the Act, because SCC is not a telecommunications carrier as the 1996 Act defines that term. Indeed, SCC itself has admitted that, quote, "SCC is not a telecommunications carrier," and has contended that the 1996 Act does not apply to SCC for that very reason. Accordingly, SCC's Petition should be denied, and the Commission should vacate the HEPAD's findings and conclusions on the specific issues that have been raised in this proceeding.

In the event the Commission decides, over Ameritech Illinois's exception, to consider the HEPAD's determinations on the specific issues that have been submitted for arbitration, the

Commission should reverse the HEPAD and find in favor of Ameritech Illinois for the reasons set forth in Section II below.

ARGUMENT

I. SCC IS NOT ENTITLED TO ARBITRATION OR TO AN INTERCONNECTION AGREEMENT UNDER THE 1996 ACT BECAUSE SCC IS NOT A "TELECOMMUNICATIONS CARRIER" UNDER THE 1996 ACT.

A. A Company Is Not Entitled To Arbitration Or To An Interconnection Agreement Under The 1996 Act Unless It Is A "Telecommunications Carrier" As Defined In The 1996 Act.

In Docket 97 AB-001 this Commission denied a petition for arbitration under the 1996 Act "on the ground that [the Petitioner] does not meet the threshold requirement that it be a telecommunications carrier under the 1996 Act." (*See* Commission Order in 97 AB-001, at 5.) That decision rested on a limitation in the Act that is as applicable today as it was then: The arbitrations that Congress provided for in the Act are available only to "telecommunications carriers," as Congress defined that term.

It is clear from the face of the 1996 Act that, as this Commission held, the entities to which sections 251 and 252 of the Act apply are "telecommunications carriers." For example:

- The incumbent local exchange carrier's duty to negotiate an interconnection agreement under the Act runs to "[t]he requesting *telecommunications carrier*." 47 U.S.C. § 251(c)(1) (emphasis added).
- The interconnection that the incumbent carrier must provide is "for the facilities and equipment of any requesting *telecommunications carrier*." 47 U.S.C. § 251(c)(2) (emphasis added).
- Unbundled access to network elements must be provided only to "any requesting *telecommunications carrier*." 47 U.S.C. § 251(c)(3) (emphasis added).

This repeated use of the words "telecommunications carrier" must be given meaning. The statute cannot be applied as if Congress said "person" or "entity" instead of

"telecommunications carrier." Rather, as the Commission correctly held in its Order in 97 AB-001, at page 4, "it is critical to the arbitration process that [the Petitioner] stand as a telecommunications carrier under the 1996 Act," and it is a "threshold requirement" of the Act (*id.* at 5) that the petitioner be a "telecommunications carrier." Thus, if SCC is not a telecommunications carrier as defined in the 1996 Act, SCC is not entitled to arbitration (or anything else) under sections 251 and 252 of the Act, and its Petition must be dismissed.[1]

B. SCC Is Not A Telecommunications Carrier.

1. SCC Admits It Is Not A Telecommunications Carrier.

There is no disputing that only telecommunications carriers are entitled to arbitration under the 1996 Act. The dispositive question, then, is a factual one: Is SCC a telecommunications carrier? SCC answered that question in a brief it filed on February 12, 1999, in the Public Utility Commission of Texas. In that brief (Attachment 1 hereto), the same SCC Communications Corporation that is the Petitioner here admitted:

> § 251(c)(2) of the FTA [federal telecommunications act] does not require SWBT to provide SCC unbundled access . . . because . . . ***SCC is not a telecommunications carrier***." (Attachment 1 at 3) (emphasis added).[2]

In that same brief, SCC acknowledged that it has no entitlements under the 1996 Act. As SCC succinctly put it:

The provisions governing interconnection under the FTA are *inapplicable to SCC*.

Id. at 13. And this, SCC explained, is because SCC is not a telecommunications carrier:

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[1] The Commission's decision in 97 AB-001 cannot be distinguished on the ground that the Petitioner in that case had not applied for certification to become a telecommunications carrier under Illinois law while SCC has obtained such certification. As we note below, the Commission in 97 AB-001 specifically ruled that the question of state law certification is different from the question whether an entity is a telecommunications carrier under the 1996 Act.

[2] SWBT is Southwestern Bell Telephone Company, Ameritech Illinois' affiliate in Texas.

> Section 251(c) requires LECs to interconnect with any requesting telecommunications carrier. Section 3(44) of the FTA defines a "telecommunications carrier" as "any provider of telecommunications services, except that such term does not include aggregators . . . (as defined in section 226)." "Telecommunications service" is defined in § 3(46) to mean "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." The term "telecommunications" is defined in § 3(43) as "the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received." SCC's database management activities do not fit within this definition.
>
> *Thus, looking to the FTA in order to determine the extent of SWBT's obligations to [SCC] is simply wrong.*

Id. at 13 (emphasis added).

2. SCC Is Bound By Its Declaration That It Is Not A Telecommunications Carrier.

Contrary to SCC's own admissions, the HEPAD recommends that this Commission decide that SCC is a telecommunications carrier under the 1996 Act after all, that SCC's activities do fit within the definition of telecommunications services in the 1996 Act, and that looking to the 1996 Act in order to determine the extent of Ameritech Illinois' obligations to SCC is simply right. But SCC never offered even a word of explanation in this proceeding for its fatal admissions in Texas. Instead, the HEPAD simply refused to hold SCC to them.

SCC, having taken the position in the clearest possible terms that it is not a telecommunications carrier under the 1996 Act, and that a State commission therefore cannot look to the 1996 Act to determine an incumbent carrier's obligations to SCC, cannot shed that position like an old shoe when it no longer fits SCC's purposes. *See, e.g., Illinois v. Coffin*, 305 Ill. App. 3d 595, 598, 712 N.E.2d 909, 911 (1st Dist. 1999) ("The doctrine of judicial estoppel provides that when a party assumes a certain position in a legal proceeding, that party is estopped from assuming a contrary position in a subsequent legal proceeding"); *New England Employee*

Benefits Group v. Klapperich, 2000 U.S. Dist LEXIS 16545, at *9 n.2 (N.D. Ill. Oct. 26, 2000) ("Judicial estoppel prevents a party that has taken one position in litigating a particular set of facts from later reversing that position to her advantage"). This doctrine "is designed to promote the truth and to protect the integrity of the . . . system by preventing litigants from deliberately shifting positions to suit the exigencies of the moment." *J & R Carrozza Plumbing Co. v. Industrial Comm. of Illinois*, 307 Ill. App. 3d 220, 225-26, 717 N.E. 2d. 438, 442 (1st Dist. 1999) (Rarick, J., concurring).

The HEPAD, however, attempts to relieve SCC of the consequences of its own admissions, on two separate but equally erroneous bases. First, the HEPAD asserts that SCC's Texas statements were not facts but legal conclusions. That is incorrect. SCC's unqualified statement that it is "not a telecommunications carrier" is not an abstract proposition of law, any more than the HEPAD's contrary finding is an abstract statement of law. Unlike, for example, a dry recitation of the Act's definition of "telecommunications carrier," SCC's statement is a description of facts (what SCC is and what it does) and how the law applies (or in this case, does not apply) to those facts.

Second, the HEPAD states (at 10) that "the case before the Texas PUC involved a different state of facts." Specifically, the HEPAD asserts that in Texas, the only service SCC offered was database management, while SCC plans to offer additional 911 services (such as call routing) in Illinois. But the controlling fact here is not only *what* services SCC offers, but *to whom* those services are offered. Under the 1996 Act, a party must offer services "directly to the public" or in such a way that they are "effectively available directly to the public." And on that fact, there is no difference between Texas in 1999 and Illinois in 2001. SCC's "new" 911

services, just like its "old" database management service, are offered to carriers, not to the public.

Thus, this Commission should not even entertain SCC's newly devised position that it is a telecommunications carrier. Especially in light of SCC's failure to offer any explanation here for what it told the Texas Commission, and for having "deliberately shift[ed] positions to suit the exigencies of the moment" (*J & R Carrozza Plumbing, supra*), the Commission should have no qualms about binding SCC to its previous position that it is not a telecommunications carrier. That alone is a sufficient ground to dismiss SCC's Petition.

3. Even If SCC Had Not Made Binding Admissions That It Is Not A Telecommunications Carrier, The Record Is Clear That SCC Is Not A Telecommunications Carrier.

a. Meaning Of "Telecommunications Carrier" In The 1996 Act.

Section 3(44) of the Act defines "telecommunications carrier":

> Telecommunications carrier.—The term "telecommunications carrier" means any provider of telecommunications services . . . .

Then, section 3(46) defines "telecommunications service":

> Telecommunications service.—The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public . . . .

Finally, section 3(43) defines "telecommunications":

> Telecommunications.—The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Putting these definitions together, SCC would be a "telecommunications carrier" entitled to arbitration under the Act if, and only if, it offered telecommunications service, as defined in section 3(43), for a fee *directly to the public*, or to such classes of users as to be effectively available directly to the public.

Indisputably, SCC does not offer services directly to the public. Indeed, the HEPAD finds (and the record shows) that SCC offers its services to telecommunications carriers. In the HEPAD's own words, "The evidence established that SCC's customers are ILECs, CLECs, State agencies that administer 9-1-1 services, wireless operators, emergency warning systems, and emergency roadside assistance programs." HEPAD, at 7. Conversely, "members of the general public do not pay SCC directly for its services." *Id.* Nevertheless, the HEPAD takes the position that SCC, by selling its services to telecommunications carriers that in turn serve the public, SCC offers the services to "such classes of users" (*i.e.*, its carrier-customers) as to be "effectively available directly to the public" (*i.e.*, SCC's customers' customers). As the HEPAD sees it, "any person who dials 9-1-1 can avail himself or herself of SCC's services," by virtue of the fact that the carrier serving that person uses SCC to route its 911 traffic. *Id.* The Federal Communications Commission, however, has already rejected that theory.

In *AT&T Submarine Systems, Inc.*, 13 F.C.C.R. 21,585 (rel. Oct. 9, 1998), the FCC was called on to determine whether a company called AT&T-SSI was or was not a telecommunications carrier under the 1996 Act. A party named Vitelco argued that AT&T-SSI was a telecommunications carrier, on the theory that "because AT&T-SSI sells . . . to common carriers or consortia of common carriers who sell telecommunications services directly to the public, AT&T-SSI provides a telecommunications service that is 'effectively available directly to the public.'" *Id.* ¶ 5. The FCC rejected Vitelco's argument. The FCC held, "We disagree with Vitelco that the activities of AT&T-SSI's customers are relevant to a determination whether AT&T-SSI is a telecommunications carrier. . . . As the Commission has previously held, the term 'telecommunications carrier' means essentially the same as common carrier. It does not . . . introduce a new concept whereby we must look to the customers' customers to determine the

status of a carrier." *Id.* ¶ 6. The United States Court of Appeals for the District of Columbia Circuit affirmed the FCC's decision. *Virgin Islands Tel. Corp. v.* FCC, 193 F.3d 921 (D.C. Cir. 1999).

Thus, once this Commission concludes (as it must, and as the HEPAD did) that SCC does not offer its services "directly to the public," it makes no difference if SCC sells its services to others who in turn sell services to the public. As a matter of controlling federal law, SCC is not a telecommunications carrier under the 1996 Act if SCC does not itself provide telecommunications directly to the public.[3]

b. SCC Is Not A Telecommunications Carrier Because SCC Does Not Provide Telecommunications Services Directly To The Public.

SCC's Texas admissions that it is not a telecommunications carrier are fully corroborated by SCC's Petition in this proceeding and by SCC's recent public declarations about its business, including declarations SCC made to this Commission just last fall.

According to SCC's Petition (at 3-4):

> SCC provides telecommunications services that facilitate, enhance, and advance the provision of emergency services . . . to end users of wireline, wireless, and telematics (*e.g.*, On Star and Automatic Crash Notification) service providers. Specifically, SCC aggregates and transports such traditional and nontraditional emergency call traffic from multiple service providers to appropriate Selective Routing Tandems where such traffic is then transported to the Public Safety Answering Points. ('PSAP'). . . . Aggregating emergency call traffic reduces the number of facilities that must interconnect with the incumbent local exchange

[3] Given that a company must offer telecommunications directly to the public in order to be a telecommunications carrier under the 1996 Act, one may fairly ask what is the import of the concluding phrase of section 3(46) – "or to such classes of users as to be available directly to the public." The D.C. Circuit answered this question in its decision affirming the FCC's order in the AT&T-SSI case. As the court explained, the concluding phrase in section 3(46) can be read as reflecting a "distinction between serving the entire public and serving only a fraction of the public." 198 F.3d at 926. Thus, to qualify as a telecommunications carrier under the 1996 Act, a company must offer its services directly to the public, even if it thereby serves only a fraction of the public.

carriers' ("ILECs'") Selective Routing Tandems, resulting in a more efficient use of the telecommunications network. Such aggregation also reduces the ILEC's administrative responsibilities: rather than coordinate and interconnect with multiple service providers individually, the ILEC need only coordinate and interconnect with SCC in order to handle the emergency call traffic from multiple service providers. In addition, SCC offers its service provider customers and the interconnecting ILEC assurance that emergency call traffic will be passed to the ILEC's Selective Routing Tandems through redundant, self-healing facilities provided by SCC.

Not only will SCC provide efficient and reliable transport of emergency call traffic, but SCC also offers state-of-the-art database management services through its 9-1-1 SafetyNet℠ product offering.

That passage makes clear that SCC provides services to its "service provider customers," *not* directly to the public or to such classes of users as to be effectively available directly to the public.[4] Moreover, SCC's descriptions of itself and its business in other public documents confirm that SCC does not provide telecommunications directly to the public. Merely by way of example:

- On its website, SCC repeatedly identifies its customers as "Incumbent Local Exchange Carriers (ILECs), Competitive Local Exchange Carriers (CLECs), Integrated Communications Providers (ICPs) and Wireless Carriers" who can "outsource their 9-1-1 management requirements to us." (Attachment 2 hereto, first page.[5]) (*See also id.*, second page.) SCC does not provide its services directly to the public.

- In its September 14, 2000, Application for Certificate to Become a Telecommunications Carrier in Illinois ("Application") (Attachment 3

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[4] Note that in the first quoted sentence, SCC says it facilitates, enhances and advances the provision of emergency services to *end users of wireline, wireless and telematics providers.* Here and elsewhere in its Petition, SCC – having been put on notice during the parties' negotiations that its entitlement to arbitration would be challenged – refers to the benefits its services provide to "end users." Always, though, the end users are the customers of SCC's customers; they are not served directly by SCC, as they would have to be in order for SCC to qualify as a telecommunications carrier.

[5] Attachment 2 is a set of print-outs from SCC's website at www.scc911.com. Most of the pages in Attachment 2 are not cited in this brief, but are included in the event that the Commission may wish additional information about SCC. Taken as a whole, Attachment 2 corroborates throughout that SCC is not a telecommunications carrier.

> hereto), SCC acknowledged, "SCC does not have any end-user telephone subscribers." *Id.* at 8, 9.[6] Rather, "As an agent for incumbent local exchange carriers, competitive local exchange carriers, integrated communications providers, and wireless carriers, SCC provides database management services nationwide." (*Id.* at 3.)

Thus, the law is clear and the facts are clear: The only entities that are entitled to arbitration under the 1996 Act, as this Commission correctly held in Docket 97 AB-001, are telecommunications carriers. SCC is not a telecommunications carrier. It has said in so many words that it is not a telecommunications carrier, and the evidence shows it is not a telecommunications carrier, as the 1996 Act defines that term, because it does not provide telecommunications directly to the public. SCC therefore is not entitled to arbitration under the 1996 Act, and its Petition should be dismissed.

4. SCC Has Offered No Evidence That It Is A Telecommunications Carrier.

The HEPAD finds that SCC is a telecommunications carrier. SCC offered no evidence to support that contention, however, and in the absence of such evidence, the HEPAD cannot stand and SCC's Petition must be dismissed.

The elements of the threshold requirement that SCC must satisfy in order to continue this arbitration are defined by the law, including, for example, the definition of "telecommunications service" in the 1996 Act. Once the elements of the legal requirement are known, however, the determination whether SCC meets that requirement is a question of fact. What service does SCC provide? Does it provide its service directly to the public? For the answers to these questions, the Commission must look to evidence.

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[6] Attachment 3 includes the Application itself and one of the Appendices to the Application. We have numbered the pages comprising Attachment 3 for ease of reference.

It is SCC's burden to prove it is a telecommunications carrier, not Ameritech Illinois' burden to prove the opposite. The burden of proof is a burden to establish facts with evidence. Assertions in a brief are not evidence, and are entitled to no weight unless they are supported by evidence. *E.g.*, *Williams v. Manilla*, 2000 U.S. Dist. LEXIS 13559, *16 (N.D. Ill. Sept. 12, 2000) ("Unsupported statements in a brief are not evidence and cannot be given any weight"); *Paoletti v. Industrial Comm.*, 279 Ill. App. 3d 988, 999, 665 N.E.2d 507, 514 (1st Dist. 1996) ("A brief . . . is not evidence and it is well settled that the Commission's findings must be based on evidence introduced in the record"). Thus, whatever SCC may say in its reply brief, the Commission must look to the evidence to determine whether SCC is, in fact, a telecommunications carrier.

The closest that SCC and the HEPAD come to offering any evidence to support SCC's position was to cite to two State commission certifications, one from Illinois and one from Texas, authorizing SCC to provide certain services. Those certifications, however, which SCC will likely cite again, are not evidence that SCC is a telecommunications carrier under the 1996 Act. As this Commission has held, "the 'telecommunications carrier' requirement is different from the question of 'certification.'" (Order in Docket 97 AB-001, at 5.) And indeed, the two certification orders to which SCC has cited include nothing that suggests SCC is a telecommunications carrier under the 1996 Act.

The Illinois Certification Order (apart from waiving virtually every Illinois administrative code requirement that applies to telecommunications providers on the ground that SCC provides neither long-distance nor local exchange service), merely certifies SCC to provide certain services *under Illinois law*. It specifically notes that SCC's request was to obtain certificates of service authority, and that SCC sought to become (in the future) a telecommunications carrier

"within the meaning of Section 13-202 of the Illinois Public Utilities Act." Nothing in the Order remotely suggests that SCC is or will be a telecommunications carrier under the 1996 Act, or even that SCC will in fact do what the Commission has certified it to do. Thus – and especially in light of this Commission's explicit recognition in 97 AB-001 that the telecommunications carrier requirement of the 1996 Act is different from the question of certification under Illinois law – the Illinois Order offers no support for SCC's claim that it is a telecommunications carrier under the 1996 Act.

The Texas Certification Order:

- concludes (at part II, ¶ 1) that SCC is a telecommunications provider under Texas law, but nowhere suggests SCC is a telecommunications carrier under the 1996 Act; and
- states (at part I, ¶ 22) that the Applicant's Request indicates "*The Applicant [SCC] has never provided telecommunications services in Texas or any other state.*" (Emphasis added.)[7]

In sum, SCC offered literally no evidence of the facts that it wants this Commission to accept as the basis for a conclusion that SCC is entitled to arbitration under the 1996 Act, and it

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[7] SCC asserted at an earlier stage of this proceeding that the Texas Order concludes that SCC offers telecommunications services, but that assertion was demonstrably false. Specifically, SCC stated, in its Response to Ameritech Illinois' Motion to Dismiss the Petition, at page 5:

> The Texas Public Utility Commission, moreover, held that inasmuch as "'the provision of selective routing . . . when sold directly to the public (e.g., to public safety agencies) constitutes a 'telecommunications service[,]'" SCC offers telecommunications services.

That was a blatant attempt to mislead. In the first place, the language that SCC quoted from the Texas Order (namely, part I, ¶ 12) is a description of SCC's application, not a holding of the Texas Commission. In the second place, SCC's purported quote was in fact an egregious misquote. The language in quote marks in SCC's Response – in other words, the language that SCC is attributing to the Texas Order – says that "the provision of selective routing . . . when sold directly to the public (e.g., to public safety agencies) constitutes a telecommunications service." But the phrase "*when sold directly to the public*" – so very crucial to the question whether an entity is a telecommunications carrier under the 1996 Act – does not appear in the Texas Order, either in the paragraph SCC was supposedly quoting or anywhere else.

was plain error for the HEPAD to recommend, based on the record, that SCC is a telecommunications carrier under the 1996 Act.

5. Even The Unsupported Arguments That SCC Has Previously Made Do Not Make The Case That SCC Is A Telecommunications Carrier Under The 1996 Act.

The foregoing discussion set forth two reasons – each of them sufficient by itself – for dismissing SCC's Petition:

First, SCC told the Public Utility Commission of Texas in no uncertain terms that "SCC is not a telecommunications carrier"; that "The provisions governing interconnection under the FTA are inapplicable to SCC"; and that "looking to the FTA in order to determine the extent of [an incumbent carrier's] obligations to SCC is simply wrong." SCC cannot properly be allowed to change horses for purposes of this proceeding.

Second, SCC failed to carry its burden to prove it is a telecommunications carrier.

But even putting aside SCC's failure to *prove* that it is a telecommunications carrier, the unsupported arguments that SCC has offered to date do not – even if the factual assertions they rest on were supported by the evidence – lead to the conclusion that SCC is a telecommunications carrier.

SCC has contended that the service that SCC provides and that it wants this Commission to conclude is a "telecommunications service" is "selective routing database management services." According to SCC, selective routing database management services are telecommunications services because, as SCC has argued, paragraph 18 of the FCC's *Forbearance Order*[8] holds that "selective routing database management is an adjunct service that

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[8] *Bell Operating Companies Petitions for Forbearance from Application of Section 272 of the Communications Act of 1934, as Amended, to Certain Activities*, CC Docket No. 96-149, Memorandum Opinion and Order, 13 FCC Rcd 2627, 2638 (1998).

falls into the 'telecommunications management exception' to the definition of 'information service.'" The *Forbearance Order* holds no such thing, either at paragraph 18 or elsewhere.

In paragraph 18 of the *Forbearance Order*, the FCC addressed an argument by an incumbent LEC (U S West) that its "storage and retrieval of the information that emergency service personnel use to respond to E911 calls fall within the 'telecommunications management exception' because those functions are adjunct services . . . ." The FCC held, "We reject th[is] argument[]." *Id.* As the FCC went on to explain,

> Although the "telecommunications management exception" encompasses adjunct services, the storage and retrieval functions associated with the . . . automatic location identification databases provide information that is useful to end users, rather than carriers. As a consequence, *those functions are not adjunct services and **cannot** be classified as telecommunications services on that basis.*

Id. (emphasis added and footnotes omitted). SCC's contention that the FCC held that selective routing database management is a telecommunications service is transparently wrong on two counts, both of which are apparent on the face of paragraph 18, without even delving deep into the technical particulars. *First*, there is no mention in paragraph 18 (or anywhere else in the *Forbearance Order*) of selective routing database management.[9] *Second*, the only thing that the FCC held in paragraph 18 was that certain database functions are *not* adjunct services, and so *cannot* be classified as telecommunications services. Thus, the *Forbearance Order* plainly does not hold what SCC says it holds,[10] and SCC is left with no support for its claim that it is a telecommunications carrier because it provides selective routing database management. Rather, the state of affairs is exactly as it was when SCC made the following argument to the Public

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[9] In fact, a LEXIS search for "selective routing database management" in the entire FCC database comes up empty.

[10] Ameritech Illinois respectfully reminds the Commission that even if the *Forbearance Order* did hold what SCC says it holds, SCC's arbitration petition would still have to be dismissed because of SCC's failure to prove any facts that would bring SCC within the scope of the FCC's discussion.

Utilities Commission of Texas based in part on the *Forbearance Order* – a radically different argument than SCC makes here:

> Under federal law, telecommunications services and information services are two distinct services,[16] and E9-1-1 services are information services.[17]
>
> 16 *Compare* 47 U.S.C. § 153(46) (defining "telecommunications service") *with* 47 U.S.C. § 153(20) (defining "information service").
>
> 17 *Forbearance Order*, ¶¶ 17-19.

Attachment 1 hereto, at 8 (footnotes in original).[11]

There is, then, no possible basis for a conclusion by this Commission that SCC is a telecommunications carrier because it provides selective routing database management services.

SCC has also contended that even if selective routing database management is not a telecommunications service, SCC is still somehow a telecommunications carrier because it purportedly offers telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public. There is no evidence in the record to support that contention, however – nor has SCC offered any evidence or argument that even begins to overcome the FCC's clear holding in *AT&T Submarine Systems, Inc., supra,* that an entity cannot qualify as a telecommunications carrier by serving carriers that in turn provide telecommunications services to the public; rather, the entity must itself provide telecommunications service directly to the public.

Based on the record in this proceeding, SCC's customers are incumbent local exchange carriers, competitive local exchange carriers, integrated communications providers and wireless carriers, *not* end users of any telecommunications service. There is no support in the record for

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[11] SCC's proposition that information services (including E9-1-1 services) and telecommunications services are two different things is also supported by the distinction made between the two in 47 U.S.C. § 272(a)(2)(B) and (C).

the proposition that SCC provides any telecommunications service directly to the public, and therefore no basis for a conclusion that SCC is a telecommunications carrier under the 1996 Act.

C. SCC Also Is Not Entitled To Arbitration Under The 1996 Act Because It Does Not Seek Interconnection Under The 1996 Act.

There is yet another reason that SCC's Petition should be denied – one that the HEPAD fails to address. While SCC claims to be seeking interconnection under the 1996 Act, what SCC is seeking is in fact not interconnection as that term is defined in the 1996 Act.

SCC states (at page 5 of its Petition):

> In order to provide the aforementioned aggregation, transport, and database management services, SCC must interconnect its network with the ILECs that have connections with and provide 9-1-1 services to the PSAPs. Thus, *pursuant to the Act, SCC seeks to interconnect its network with SBC's network* at every SBC Selective Routing Tandem in SBC's operating territories. *SCC seeks to interconnect with SBC's Selective Routing Tandems*, just as other competitive carriers do to provide their end users with emergency services. In addition, *SCC seeks to interconnect its ALI nodes with SBC's ALI nodes* (*i.e.*, ALI Steering or Dynamic ALI Updates) so that PSAPs can access location information of the end users of wireless and telematics service providers where such information resides in SCC's ALI nodes. (Emphasis added.)

Thus, SCC claims that what it is seeking is interconnection under the 1996 Act. Under the 1996 Act, however, interconnection is, by definition, "for the transmission and routing of *telephone exchange service* and *exchange access*." 47 U.S.C. § 251(c)(2)(A) (emphasis added). SCC does not provide – and has no intention to provide – telephone exchange service or exchange access. In the Texas brief referred to above, SCC flat out admitted that it does not (and cannot) interconnect under section 251(c)(2) of the Act. SCC said, "The provisions governing interconnection under the FTA are inapplicable to SCC; therefore, SCC does not seek to 'interconnect' under § 251(c)." (Attachment 1, at 13.) *See also id.* at 4 ("SCC is not claiming rights to interconnect under § 251 of the FTA").

In its Illinois Application, SCC repeatedly stated (*e.g.*, at pages 1, 2 and 4) that it does not provide long distance toll services or local exchange dial tone services and does not intend to provide such services *and* that SCC "does not own, operate or maintain any local access lines" (*id.* at 8, 9). Thus, SCC does not provide, and by its own declaration will not provide, telephone exchange service or exchange access in Illinois. From that it necessarily follows that SCC is not seeking interconnection under the 1996 Act, and therefore that SCC is not entitled to arbitration under the 1996 Act.

SCC has not disputed the proposition that it is not entitled to arbitration unless it is seeking interconnection "for the transmission and routing of telephone exchange service and exchange access," nor did it dispute the fact that it does not provide exchange access. The HEPAD finds, with almost no supporting analysis, that SCC provides telephone exchange service. The Commission should reject that finding for several reasons:

First, SCC told the Texas Commission that the interconnection provisions of the 1996 Act are inapplicable to SCC, and that SCC does not claim the right to interconnect under section 251 of the 1996 Act. (Attachment 1, at 13.) SCC ignores these fatal admissions, just as it ignores its admissions that it is not a telecommunications carrier, apparently in the hope that this Commission will ignore them as well. The Commission should hold SCC to its admission that it is not entitled to interconnection under section 251(c)(2) of the 1996 Act for the same reasons that it should hold SCC to its admissions that it is not a telecommunications carrier.

Second, SCC told this Commission in Docket 00-0606 that SCC "does not provide . . . local exchange service" (*see* December 20, 2000, Order in Docket 00-0606 (Attachment 4 hereto), at 2), and this Commission evidently relied on that representation in waiving legal requirements that would otherwise apply to SCC. *Id.* SCC's representation in Docket 00-0606

that it does not provide local exchange service was, it appears from the Commission's Order, not qualified or limited in any way. SCC is therefore judicially estopped from asserting in this proceeding that it provides telephone exchange service.

Third, SCC has offered no *evidence* to support any assertion it makes in support of its claim that it provides telephone exchange service.

Fourth, the HEPAD's citation to FCC determinations that telephone exchange service is not limited to traditional local telephone service lead nowhere. To be sure, the FCC has recognized as "telephone exchange service" certain services that are not traditional local telephone services, but that does not mean that anything and everything is telephone exchange service. Rather, one must look at the rationale for the FCC's determination and see whether it applies here. In holding that Commercial Mobile Radio Service ("CMRS") companies provide telephone exchange service, the FCC reasoned:

> [C]ellular, broadband PCS, and covered SMR providers fall within the second part of the definition [of "telephone exchange service"] because they provide "comparable service" to telephone exchange service. The services offered by cellular, broadband PCS, and covered SMR providers are comparable because, as a general matter, . . . these CMRS carriers provide local two-way switched voice service as a principal part of their business. . . . In addition, the fact that most CMRS providers are capable . . . of providing fixed services . . . buttresses our conclusion that these CMRS providers offer services that are "comparable" to telephone exchange service and supports the notion that these services may become a true economic substitute for wireline local exchange service in the future.

First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 (rel. Aug. 8, 1996), ¶ 1013.

Obviously, the FCC was not saying that anything and everything is a telephone exchange service. Rather, it reasoned that the service provided by CMRS carriers is telephone exchange service because the carriers provide "local two-way switched voice service as a principal part of their business" and because their service "may become a true economic substitute for wireline

local exchange service in the future." SCC does not claim, and cannot claim, that that is true for any service that it provides.[12]

The HEPAD's statement (at 5) that "SCC connects to the ILEC at a switch or hub, which connects at the same place, and in the same manner, as any CLEC would connect" is equally irrelevant. The test for interconnection here is not the place or manner in which SCC connects its facilities to those of a carrier, it is the service that SCC provides (or in this case, the services SCC does not provide, namely telephone exchange service and exchange access).

Finally, in order to qualify as "telephone exchange service" under the 1996 Act, a service "must permit 'intercommunication' among subscribers within the equivalent of a local exchange." Order on Remand (FCC 99-413), *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd. 385 (rel. Dec. 23, 1999), ¶ 23. There is no indication in the record that any service offered by SCC permits such *intercommunication among subscribers*.

D. Ameritech Illinois Timely Brought To The Commission's Attention SCC's Failure To Satisfy The Threshold Requirement That It Be A Telecommunications Carrier.

SCC has previously argued that Ameritech Illinois waived the right to raise the fact that SCC is not a telecommunications carrier by negotiating with SCC and by not contesting SCC's application for a certificate of service authority. SCC's waiver argument was very weak – to the point that it showed only how far SCC was willing to reach to try to come up with some argument that would spare its Petition from dismissal.

Of all the reasons that SCC's waiver arguments fail, however, one stands out: Because SCC is not a telecommunications carrier, the Commission lacks subject matter jurisdiction over

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[12] Significantly, CMRS providers offer their services directly to the public; SCC, in contrast, does not.

SCC's petition for arbitration. That being so, Ameritech Illinois cannot possibly, as a matter of law, have waived the argument that SCC is not a telecommunications carrier. For it is axiomatic that a tribunal's lack of subject matter jurisdiction cannot be waived. *E.g., Currie v. Lao,* 148 Ill. 2d 151, 157, 592 N.E.2d 977, 979 (1992) ("the issue of subject matter jurisdiction cannot be waived"); *Illinois v. Wright,* 189 Ill. 2d 1, 20, 727 N.E.2d 230, 241 (1999) (Freeman, C.J., concurring) ("Subject matter jurisdiction cannot be waived, stipulated to, or consented to by the parties"); *United States v. Tittjung,* 2000 U.S. App. LEXIS 31902, *7 (7th Cir. 2000) ("neither the parties nor their lawyers may stipulate to jurisdiction or waive arguments that the court lacks jurisdiction"); *Floyd v. Thompson,* 227 F.3d 1029, 1035 (7th Cir. 2000) ("basic subject matter jurisdiction . . . can never be stipulated or waived"). Indeed, the Commission would be obliged to dismiss the petition on its own upon recognizing the jurisdictional defect, even if Ameritech Illinois never asserted it. *E.g., Wright,* 189 Ill. 2d at 20, 727 N.E.2d. at 241 ("The lack of subject matter jurisdiction may be raised at any time, in any court, by the parties or on the court's own motion"); *Tittjung,* at *3 ("[I]f the parties neglect the subject, a court must raise the jurisdictional question on its own").

* * * * *

On some matters, the 1996 Act gives this Commission discretion to make policy and to enforce State law requirements. One matter on which the Act gives the Commission no discretion, however, is the determination of who is entitled to arbitration under the 1996 Act. Congress has dictated that only telecommunications carriers, as Congress has defined them, can petition for arbitration. Abundant record evidence establishes that SCC does not fit within Congress's definition of a telecommunications carrier, and SCC has provided no evidence to the contrary. And apart from that, SCC has declared in so many words that it is not a

telecommunications carrier, and that the 1996 Act therefore does not apply to SCC. SCC has never even tried to explain why it should not be bound by those admissions here. SCC is, by law, bound by those admissions. For these and the other reasons set forth above, the Commission should dismiss SCC's Petition and reach no other issue in this proceeding. Accordingly, the Commission should (i) delete section III.A of the HEPAD and replace it with the proposed language attached hereto as Attachment 5; (ii) delete Section III.B. of the HEPAD in its entirety; (iii) delete Section IV of the HEPAD in its entirety, and replace it with the following:

III. Findings and Ordering Paragraphs

Upon due consideration of the entire record herein, the Commission hereby finds that:

1. Illinois Bell Telephone Company d/b/a Ameritech Illinois is a telecommunications carrier certificated to provide local exchange and intra-MSA services in Illinois;

2. SCC Communications Corporation holds certificates of service authority pursuant to 220 ILCS 5/13-403, 13-404, and 13-405, but is not a "telecommunications carrier" as that term is defined by the Telecommunications Act of 1996;

3. Accordingly, the Commission lacks jurisdiction over the subject matter of SCC's purported Petition for Arbitration Pursuant to Section 252(b) of the Act;

4. The facts recited and conclusions reached in the prefatory sections of this Order are supported by substantial evidence in the record and are hereby adopted as findings of fact and conclusions of law;

5. The Petition for Arbitration by SCC should be dismissed for the reasons set forth above.

IT IS THEREFORE ORDERED that SCC's Petition for Arbitration in this proceeding is hereby dismissed.

IT IS FURTHER ORDERED that any petitions, objections or motions made in this proceeding that have not been specifically ruled upon are hereby disposed of in a manner consistent with the conclusions contained herein.

II. DISCUSSION OF SPECIFIC ARBITRATION ISSUES

In the event the Commission reaches the merits of the five specific issues that remain unresolved, Ameritech Illinois asks that it reverse the HEPAD's recommendations on three of them. We discuss each of these three issues in turn below.

ISSUE 1.B.1 Advanced Services: Acceptability for Deployment

AMERITECH ILLINOIS POSITION

The rules and procedures for deployment of advanced services (which precisely track the rules laid out by the FCC) should be set forth in a separate DSL appendix. The Commission should reject SCC's proposal to load those rules into the definitions section of the General Terms and Conditions.

DISCUSSION

The issue here is quite narrow. The FCC has recognized the need to protect the quality and reliability of the traditional, circuit-switched telephone network, and to prevent the deployment of certain advanced digital technologies that might interfere with the signals of other carriers and end users. The FCC has already established the procedural and substantive rules for determining whether a given advanced technology is acceptable for deployment. Ameritech Illinois proposes that the agreement follow the FCC's rules, and SCC agrees – in fact, it insists that the agreement "*must* reference the FCC's criteria for determining acceptability." SCC Petition, at 31 (emphasis added).[13]

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[13] Under the FCC's rules, prior to deploying advanced technology, a party must give the incumbent carrier notice of the type of technology it proposes to use along with certification that such technology is acceptable for deployment. *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 F.C.C. Rcd. 20, 912, ¶ 204. The FCC's rules provide that an advanced services loop technology, like xDSL service, is "presumed acceptable for deployment" if it either (1) complies with existing industry standards; or (2) is approved by an industry standards body, the FCC, or any state commission as acceptable for deployment; or (3) has been successfully deployed by any carrier without significantly degrading the performance of other services. 47 C.F.R. § 51.230(a). The requesting carrier has the burden of demonstrating to the state commission that its proposed technology satisfies one of these standards and that it will not degrade the performance of other advanced services or traditional voice services. *Id.* § 51.230(c). If, and only if, the requesting party meets that burden, the incumbent LEC then has the burden of showing that the technology in question would significantly degrade the performance of other services. *Id.* § 51.230(b).

The issue, then, is how best to reflect the parties' agreement. Ameritech Illinois's position is that the rules for deployment of advanced services should be set forth in a separate appendix designed specifically for those services, just as it does in its interconnection agreements. Am. Ill. Ex. 2 (Colin Direct) at 3-4. That way, the Agreement will contain specific rules and procedures, and the parties will know exactly where to look for them (and where to go if they need to amend the rules going forward, given the rapid evolution of the law and technology in this area). *Id.* at 3 ("Were the terms and conditions specific to DSL scattered throughout the interconnection agreement, it would be very difficult to manage modifications and ensure that the terms and conditions remain consistent").

SCC, meanwhile, proposed that the Agreement merely contain a one-sentence definition of advanced services in its General Terms and Conditions. The definition was issued by the FCC *before* it laid out the more specific rules on such services in its *Line Sharing Order*, and it does not reflect those rules (even though SCC states that it should). Tr. 133 ("The technology is changing . . . . we have to go with more specificity than what's shown in a year-and-a-half old book"). Nor does it track the definition contained in the FCC's SBC/Ameritech merger conditions, which bear on other appendices. Am. Ill. Ex. 2 (Colin Direct) at 3. Clearly, if SCC intends to deploy advanced services at some point, the Agreement should contain more detail as to what services may be deployed and how SCC can go about ordering and deploying them. The only practical way to provide that level of detail is by a separate appendix, just as Ameritech Illinois suggests.

Nevertheless, the HEPAD finds that the FCC criteria for deployment of advanced services should merely be referenced in the general terms and conditions ("GTC"), as part of the definition of advanced services, instead of being expressly set forth in a separate appendix. The

HEPAD's sole rationale for this treatment is that the definition of advanced services is included in the GTC section of "the generic Ameritech interconnection agreement." But the issue here is not where the definition of advanced services should be, but where the rules for deployment should be. As Ameritech Illinois witness Colin explained at the hearing, while the generic Ameritech agreement includes the definition of advanced services in the GTC, it places the rules for deployment in a separate appendix, just as Ameritech Illinois proposes here. *See* Tr. 129 (the agreement "would also include a DSL appendix which would go into further detail with regard to other conditions").

PROPOSED COMMISSION ACTION

The Commission should delete the final sentence of the "Commission Analysis and Conclusion" under issue I.B.1, at page 13 of the HEPAD, and replace it with the following:

> The Commission finds that the rules for deployment of advanced services should be set forth in a separate appendix designed specifically for those services, just as in Ameritech Illinois' interconnection agreements. Am. Ill. Ex. 2 (Colin Direct) at 3-4. In this way, the Agreement will contain specific rules and procedures, and the parties will know exactly where to look for them (and where to go if they need to amend the rules going forward, given the rapid evolution of the law and technology in this area). *Id.* at 3 ("Were the terms and conditions specific to DSL scattered throughout the interconnection agreement, it would be very difficult to manage modifications and ensure that the terms and conditions remain consistent").
>
> Conversely, the Commission rejects SCC's proposal that the Agreement merely contain a one-sentence definition of advanced services in its General Terms and Conditions. The definition was issued by the FCC *before* it laid out the more specific rules on such services in its *Line Sharing Order*, and it does not reflect those rules (even though SCC states that it should). Tr. 133 ("The technology is changing . . . . we have to go with more specificity than what's shown in a year-and-a-half old book"). Nor does it track the definition contained in the FCC's SBC/Ameritech merger conditions, which bear on other appendices. Am. Ill. Ex. 2 (Colin Direct) at 3. Clearly, if SCC intends to deploy advanced services at some point, the Agreement should contain more detail as to what services may be deployed and how SCC can go about ordering and deploying them. The only practical way to provide that level of detail is by a separate appendix, as Ameritech Illinois suggests.

ISSUE 2(b) Tariffs

AMERITECH ILLINOIS POSITION

Pricing for 911-related services should be determined by Ameritech Illinois's Commission-approved special access tariffs, or (if the specific product or service does not appear in the tariff) by the Bona Fide Request process. Pricing should not be based on rates for unbundled access, because those rates apply only to elements used for telecommunications services, and SCC's 911 offering is not a telecommunications service.

DISCUSSION

The bottom-line question here is the prices that SCC should pay for the products and services it receives under the Agreement. The answer is simple. The Commission has already approved prices for most, if not all, of these products and services as part of Ameritech Illinois's special access tariffs. The Agreement need only incorporate those tariffs by reference; thus, if the Commission approves new or different prices, the prices paid by SCC would be updated automatically. To the extent SCC seeks a product or service that is not set forth in the special access tariffs, the Agreement (just like Ameritech Illinois's standard interconnection agreements) should set forth a Bona Fide Request procedure to determine a price.

The HEPAD (at 15) correctly finds that the Agreement should reference pricing in Ameritech Illinois's tariffs, and properly rejects SCC's proposal to include a separate price list in the Agreement on the ground that "the tariffs may change." But it points to the wrong tariffs: instead of using Ameritech Illinois's special access tariffs, the HEPAD finds that pricing should be based on the rates for unbundled network elements. That was error, because the 1996 Act provides that those rates apply only to unbundled network elements requested by a "telecommunications carrier for the provision of a telecommunications service." 47 U.S.C. §

251(c)(3). SCC would pay the UNE rates specified by the Act if – but only if – all three of the following conditions are satisfied:

(a) SCC seeks access to a facility that qualifies as an unbundled network element;

(b) SCC is a "telecommunications carrier" as that term is defined in the Act; and

(c) The specific service SCC intends to provide, using the product or service ordered from Ameritech Illinois, is a "telecommunications service" as that term is defined in the Act.

As described in Section I, SCC is not a telecommunications carrier, and its 911 offering is not a "telecommunications service" because it is not offered "directly to the public" as the Act requires. Accordingly, SCC fails tests (b) and (c), and does not qualify for UNE pricing.

PROPOSED COMMISSION ACTION

For the reasons described above, the Commission should delete the last three paragraphs of the Commission Analysis and Conclusion under Issue 2(b) (beginning "As stated above") and replace it with the following:

> The Commission finds that SCC's 911 offering is not a "telecommunications service" because it is not offered "directly to the public" as the Act requires. In a brief it filed on February 12, 1999, in the Public Utility Commission of Texas, SCC admitted: § 251(c)(2) of the FTA [federal telecommunications act] does not require SWBT to provide SCC unbundled access . . . because . . . ***SCC is not a telecommunications carrier.***" (Am. Ill. Post-hearing Br. attachment 1 at 3) (emphasis added).
>
> In its arbitration petition here (at 3-4), SCC has similarly acknowledged that it provides services to "*service provider* customers," *not* directly to the public or to such classes of users as to be effectively available directly to the public. As SCC explained, its service "aggregates and transports such traditional and nontraditional emergency call traffic from multiple *service providers* to appropriate Selective Routing Tandems where such traffic is then transported to the Public Safety Answering Points." On its website, SCC repeatedly identifies its customers as "Incumbent Local Exchange Carriers (ILECs),

Competitive Local Exchange Carriers (CLECs), Integrated Communications Providers (ICPs) and Wireless Carriers" who can "outsource their 9-1-1 management requirements to us." (Am. Ill. Post-hearing Br., Attachment 2, first page.) (*See also id.*, second page.). And in its September 14, 2000, Application for Certificate to Become a Telecommunications Carrier in Illinois ("Application") (Am. Ill. Post-hearing Br. attachment 3), SCC acknowledged, "SCC does not have any end-user telephone subscribers." *Id.* at 8, 9. Rather, "As an agent for incumbent local exchange carriers, competitive local exchange carriers, integrated communications providers, and wireless carriers, SCC provides database management services nationwide." (*Id.* at 3.)

Accordingly, SCC fails test (c), and does not qualify for UNE pricing.

ISSUE 6(b) Unbundled Network Elements

AMERITECH ILLINOIS POSITION

The Commission need not and should not adopt SCC's proposal that the Agreement provide for unbundled access to network elements "as required by applicable law." The Agreement already provides for access to all the elements currently required by law, and it provides an orderly procedure for addressing any changes in applicable law. SCC's proposed language is vague, and virtually invites subsequent disputes as to what elements are required by "applicable law," and how and when access to those elements is to be provided.

DISCUSSION

The Commission need not reach this issue at all. As described under Issue 2(b), SCC is not entitled to unbundled network elements because it is not a telecommunications carrier and does not seek to use network elements for providing a telecommunications service. The discussion that follows presents and supports Ameritech Illinois's position on the merits, in the event the Commission does consider this issue.

The HEPAD finds, and the parties agreed, that Ameritech Illinois's proposed agreement provides for unbundled access to all the network elements for which such access is now required by law. Ameritech Illinois's proposal also allows for changes in governing law, including any new network elements that Ameritech Illinois might be required to unbundle at some later date. The language of that provision (section 21.1 of the General Terms and Conditions) is also undisputed, and the HEPAD even agrees (at 16) that it "provides an orderly process for amending the contract to conform to changes in the law, as suggested by Ameritech."

The HEPAD nevertheless finds that the Agreement (specifically, section 1.5 of the UNE Appendix) should require Ameritech Illinois to provide unbundled access not only to those

elements "expressly set forth in this Agreement" but also "as required by the Federal Communications Commission or the Illinois Commerce Commission." That language is unnecessary, unworkable, and unsupported. The HEPAD intended it to allow SCC to order any UNEs that might be identified in future FCC or Commission orders, but the Agreement's change-of-law provisions already do that. To the extent SCC wants a new UNE *before* the change-of-law provision takes effect, the Agreement takes care of that, too, by allowing SCC to submit a Bona Fide Request. Given the existence of such provisions, the HEPAD's concern (at 16) that "Section 1.5 could be construed as not allowing additional UNEs to be added to the Agreement in the future" -- a construction that neither the parties nor the HEPAD have taken, and that the Commission will almost certainly disavow in its Order -- is unfounded.

The only thing the HEPAD's proposal adds is unnecessary confusion. Its language is vague and virtually invites future disputes as to what is "required by the [FCC] or the [ICC]," when such requirements become effective, how they are to be implemented, and what effect judicial review would have on those requirements. It does not provide any practical guidance for SCC to order and Ameritech Illinois to provision the hypothetical new UNEs SCC might someday want. By contrast, as the HEPAD itself acknowledges, the change-of-law provisions set forth an orderly procedure to accommodate new UNEs, by amending the Agreement to include the requisite procedures and pricing.

PROPOSED COMMISSION ACTION

For the reasons set forth above, the Commission should delete the final paragraph of the Commission Analysis and Conclusion under Issue 6(b), at page 16 of the HEPAD, and replace it with the following:

The Commission rejects SCC's suggestion that the Agreement (specifically, section 1.5 of the UNE Appendix) should further require Ameritech Illinois to provide unbundled access not only to those elements "expressly set forth in this Agreement" but also "as required by applicable law." SCC's proposal is unnecessary, unworkable, and unsupported. SCC argues that its proposal would allow it to order any UNEs that might be identified in future FCC or Commission orders, but the Agreement's change-of-law provisions already do that. To the extent SCC wants a new UNE *before* the change-of-law provision takes effect, the Agreement takes care of that, too, by allowing SCC to submit a Bona Fide Request. Thus, SCC's contentions that Ameritech Illinois's proposal would either "undermin[e] the authority of the FCC and this Commission" to add new UNEs, or "prevent SCC from availing itself of any newly identified UNEs" are unfounded.

The only thing SCC's half-sentence adds is unnecessary confusion. SCC's language is vague and virtually invites future disputes as to what the "applicable law" is, when it becomes effective, and how it is to be implemented. At six words, it does not provide any practical guidance for SCC to order and Ameritech Illinois to provision the hypothetical new UNEs SCC might someday want. By contrast, the change-of-law provisions set forth an orderly procedure to accommodate new UNEs, by amending the Agreement to include the requisite procedures and pricing.

SCC has offered absolutely no evidence to support its proposal or to show that the existing change-of-law and BFR provisions are inadequate in any way. The Agreement already addresses all the UNEs currently required by "applicable law," and it already addresses the possibility that new UNEs might be identified at some later date. The Commission accordingly adopts Ameritech Illinois's proposed language and rejects SCC's vague and unworkable proposal.

CONCLUSION

For the reasons described in Section I above, Ameritech Illinois respectfully requests that the Commission deny SCC's petition for arbitration in its entirety. To the extent the petition is not denied, Ameritech Illinois asks that the Commission revise the HEPAD and rule in favor of Ameritech Illinois on the issues presented in Section II.

Dated: March 1, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused copies of the foregoing Ameritech Illinois' Post-Hearing Brief to be served on this 9th day of February, 2001, on the following persons by overnight delivery:

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